[2021] JMCA Civ 18A

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE SIMMONS JA
THE HON MRS JUSTICE DUNBAR-GREEN JA (AG)

SUPREME COURT APPEAL NO 99/2018

BETWEEN	**PRIVATE POWER OPERATORS LTD**	**APPELLANT**
AND	**INDUSTRIAL DISPUTES TRIBUNAL**	**1st RESPONDENT**
AND	**NATIONAL WORKERS UNION**	**2nd RESPONDENT**
AND	**THE UNION OF CLERICAL ADMINISTRATIVE AND SUPERVISORY EMPLOYEES**	**3rd RESPONDENT**

Written Submissions filed by Gavin Goffe and Matthew Royal instructed by Myers Fletcher & Gordon for the appellant

Written submissions filed by the Director of State Proceedings for the 1st respondent

19 July 2021

(Further Ruling on Costs)

MCDONALD-BISHOP JA

[1] I have read in draft the judgment of Dunbar-Green JA (Ag). I agree with her reasoning and conclusion and there is nothing that I could usefully add.

SIMMONS JA

[2] I, too, have read in draft the judgment of Dunbar-Green JA (Ag). I agree with her reasoning and conclusion and I have nothing useful to add.

DUNBAR-GREEN JA (AG)

[3] On 26 March 2021, this court handed down its decision, dismissing an appeal by Private Power Operators Limited ('the appellant') and affirming the judgment of G Fraser J, made on 12 September 2018. At that time, the court made the following order for costs at paragraph [114] of the judgment:

> "Costs of the appeal to the respondents to be agreed or taxed unless the appellant within 14 days of the date of this order file and serve written submissions for a different order to be made in relation to costs. The respondents shall file written submissions in response to the appellant's submissions within seven days of service upon them of the appellant's submissions."

[4] On 6 April 2021, the appellant filed written submissions requesting one of two alternative orders, in relation to costs. It was advanced "that each the 1st respondent [sic] should bear at least 50% of the appellant's costs, or in the alternative, that each party should bear its own costs". On 16 April 2021, the 1st respondent also filed written submissions in which it contended that the original order at paragraph [114] of the judgment should remain. No submissions were received from the other respondents.

[5] The background to this matter and the court's decision are set out in **Private Power Operators Ltd v Industrial Disputes Tribunal et al** [2021] JMCA Civ 18. For purposes of this judgment on the issue of costs, I will only rehearse, briefly, the salient facts, the grounds of appeal and in whose favour they were decided.

[6] On 28 June 2013, the appellant dismissed some of its unionised workers. This resulted in a dispute before the Industrial Disputes Tribunal ('the IDT') which decided that there had been no prior consultation with the unions about the redundancies, as required by paragraph 19(b) of the Labour Relations Code ('the Code') and that the employees were unjustifiably dismissed as the selection process was unfair. That decision by the IDT was upheld on judicial review. On appeal, this court concluded that the learned judge made some erroneous findings in arriving at her decision but came to the correct

conclusion that the IDT had acted within its remit and provided a rational and legal basis for its conclusion that the company did not conform to the requirement for consultation under the Code. Further, it was not transparent in its selection of workers for redundancy.

[7] In these circumstances, we found no reason to disturb the learned judge's decision in upholding the IDT's award.

[8] In challenging the decision of the learned judge, the appellant filed six grounds of appeal, viz:

> "(i) On 5 April 2016 when the IDT published the Award, it lacked jurisdiction to do so as Mr Rion Hall was no longer a member of the Tribunal, his appointment having ceased on February 9, 2016. See **Jamaica Gazette Extraordinary** Vol. CXXXVIII No. 57E (October 8, 2015);
>
> (ii) The learned judge failed to appreciate that the dicta [sic] in the **Compair case** which was based on English legislation, and which is not found in the Code, nor is part of the common law, represented irrelevant considerations that the IDT took into account;
>
> (iii) The learned judge erred in her finding that the IDT's error in its interpretation of the duty to consult under the Code was not an error of law that went to jurisdiction;
>
> (iv) Although purporting to apply the principles in **Anisminic Ltd v Foreign Compensation Commission** [1969] 1 ALL ER 208 the learned judge failed to do so by finding that only errors of law that go to jurisdiction are subject to judicial review;
>
> (v) The court having concluded that the IDT fell into error on the main issue of consultation with the union or its representatives, it ought to have either quashed the Award or remitted it to a differently constituted panel to reconsider in the light of the court's ruling, pursuant to rule 56.16(2)(b); and
>
> (vi) The learned judge exceeded the jurisdiction of the judicial review court by making her own finding that the appellant/claimant could have consulted with its unionized

> employees directly when they realized that attempts to meet with their representative unions proved futile. That was inconsistent with settled industrial relations practice."

[9] Grounds ii, iii, iv and vi were decided in favour of the appellant. Grounds i and v were decided in favour of the respondents.

Submissions on costs

Appellant's submissions

[10] The appellant made three primary arguments to support its position on how costs should be awarded. Firstly, counsel submitted that since the appellant had succeeded on four of the six grounds of appeal, there was a sufficient basis for the original costs order to be varied. He relied on rule 1.18 of the Court of Appeal Rules, 2002 ('the CAR') and rule 64.6(4)(b) of the Civil Procedure Rules, 2002 ('the CPR'). The latter rule empowers the court, in awarding costs, to have regard to whether a party had succeeded on some issues even where the said party had not been successful in the whole of the proceedings. On the basis of that rule, counsel asserted that this court should credit the appellant for its success on those particular grounds.

[11] Secondly, the appellant posited that the court should have regard to the conduct of the parties and the manner in which they had pursued particular issues (adopting the terms of rules 64.6(4)(a) and (e)(iii) of the CPR). It was therefore a relevant consideration, he argued, that the respondents had made late concessions in the appeal and that virtually none of the concessions was made prior to the appeal being heard. Counsel also indicated that had those concessions been made earlier, the time spent by each party in preparing the appeal could have been significantly shortened.

[12] Thirdly, counsel submitted that the respondents' arguments before the court below, in relation to whether the company should have consulted directly with its workers, had led to an erroneous finding by the learned judge. As such, the learned judge did not simply fall into error; she was led there.

[13] These were sufficient bases to disentitle the respondents to costs in respect of those issues, counsel contended.

[14] In explaining the appellant's concession on ground (i) (which was made in the course of oral submissions), counsel indicated that the particular ground was included in the appeal because the appointment of the member to the IDT had not been gazetted in time and the relevant information surrounding the omission to do so, was only confirmed by the 1st respondent on the day before the hearing of the appeal.

[15] A further ground advanced for varying the costs order was said to be founded on rule 64.6(4)(d)(ii) of the CPR, that is, whether it was reasonable for the appellant to have raised a particular issue or issues. In this regard, it was submitted that the public interest concerns of this case made it demonstrably reasonable for the appellant to have raised the issues it did, and that in light of the profound public benefit of this court's ruling, no costs should be awarded against the appellant for raising those concerns.

1st respondent's submissions

[16] For its part, the 1st respondent submitted that the appropriate order was for the respondents to have their costs of the appeal, applying the general rule that an unsuccessful party should be ordered to pay the costs of the successful party, as set out in rule 64.6(1) of the CPR. Counsel argued that the general rule was not automatically rendered inapplicable because the respondents had not succeeded on all grounds. She relied on the dictum of Morrison J in **VRL Operations Ltd v National Water Commission and others** [2014] JMSC Civ 84, to support that submission and her further contention that in any litigation, a winning party was likely to fail on one or more issues, as had occurred in this case. Reference was also made to rule 64.6(2) of the CPR, which empowers the court to make an order for the successful party to pay all or part of the losing party's costs or make no order as to costs, and also rule 64.6(3) which requires that, in deciding who should pay costs, regard must be had to all the circumstances.

[17] Counsel then directed the court's attention to the following dictum of Nourse LJ in **Re Elgindata Ltd (No 2)** [1993] 1 All ER 232 at page 237, which elucidates similar rules in the UK:

> "…The principles are these. (1) Costs are in the discretion of the court. (2) They should follow the event, except when it appears to the court that in the circumstances of the case some other order should be made. (3) The general rule does not cease to apply simply because the successful party raises issues or makes allegations on which he fails but, where that has caused a significant increase in the length or cost of the proceedings he may be deprived of the whole or part of his costs. (4) Where the successful party raises issues or makes allegations improperly or unreasonably, the court may not only deprive him of his costs but order him to pay the whole or part of the unsuccessful party's costs...Moreover, the fourth implies that a successful party who neither improperly nor unreasonably raises issues or makes allegations on which he fails ought not to be ordered to pay any part of the unsuccessful party's cost..."

[16] On the strength of that authority, she urged us to consider that the learned judge had come to the correct decision in not quashing the IDT award, notwithstanding the erroneous arguments which were advanced below and accepted by her. Also, that the 1st respondent had not acted improperly or unreasonably in conducting the appeal and had made concessions which resulted in a reduction of the length of the proceedings.

[17] The argument, on the appellant's behalf, concerning the public benefit, was rebutted on these bases. Firstly, that the court's power to review any error of law had been settled in our jurisdiction prior to this appeal; and secondly, there was no overall public interest exception to the general rule as to the costs of an appeal.

[18] Finally, on the 1st respondent's behalf, it was observed that rule 56.15 of the CPR is notably absent from rule 1.18 of the CAR which specifies the rules of the CPR that are applicable to the Court of Appeal. Rule 56.15 contains the general rule that no order for costs may be made against an applicant for an administrative order unless the applicant acted unreasonably in making the application or in his conduct of the application. Counsel

contended that it was self-interest (to have the decision of the learned judge set aside), which motivated the appellant to pursue, in particular, the ground of appeal pertaining to the erroneous reliance on **Williams and others vs Compair Maxam Limited** [1982] ICR 156 ('**Compair**').

Analysis

[18] The principles governing the award of costs are well settled. Section 30(3) of the Judicature (Appellate Jurisdiction) Act makes it plain that the jurisdiction to award costs in this court should be exercised in accordance with the rules of court for the time being. Rule 1.18(1) of the CAR is the operative rule and it incorporates parts 64 and 65 of the CPR.

[19] Rule 64.6 of the CPR provides that, as a general rule, costs should be awarded to a successful party against the unsuccessful party, unless there is a compelling reason to depart from the general rule. It also states that, in making a determination as to who should be liable to pay costs, the court must have regard to all the circumstances. Rule 64.6(4) sets out the material considerations, as follows:

> " (a) the conduct of the parties both before and during the proceedings;
>
> (b) whether a party has succeeded on particular issues, even if that party has not been successful in the whole of the proceedings;
>
> (c)…
>
> (d) whether it was reasonable for a party-
>
> (i) to pursue a particular allegation; and/or
>
> (ii) to raise a particular issue;
>
> (e) the manner in which a party has pursued-
>
> (i) that party's case;
>
> (ii) a particular allegation; or

(iii) a particular issue;

(f)…

(g)..."

[20] The provisions in (c), (f) and (g) do not apply. They relate to payment in exaggeration of the claim and notice of intention to issue a claim.

[21] The provisions contained in rule 64.6(5) of the CPR are indicative of the wide discretion given to the court in making costs orders on discrete issues. It stipulates that the court may order that a party pays (a) a proportion of another party's costs; (b) a stated amount in respect of another party's costs; (c) costs from or until a certain date only; (d) costs incurred before proceedings have begun; (e) costs relating to particular steps taken in the proceedings; (f) costs relating to only a distinct part of the proceedings; (g) costs limited to basic costs; and (h) interest on costs.

[22] Rule 56.15(5) of the CPR is not incorporated in the CAR. That rule applies to applications before the Supreme Court and limits costs orders against an applicant for an administrative order to cases where the applicant has acted unreasonably in making the application or in its conduct.

[23] The appellant has argued that it was successful on some issues and this was a basis to vary the order for costs as proposed. Counsel cited four cases (see **Powell v Powell** [2014] JMCA Civ 11; **Townsend and another v Persistence Holdings Ltd** [2008] UKPC 15; **R (on the application of Edwards) v Environment Agency and others** [2009] 1 All ER 57; and **Berkeley v Secretary of State for the Environment** [2001] 2 AC 603). Those cases were provided without any context or reference as to how they relate to any submission on costs. They were of no assistance as they were, in the main, seemingly in support of arguments as to why the appeal should have been allowed. Suffice it to say, that issue was no longer before us.

[24] Invaluable guidance was found in Chadwick LJ's precis of the guiding principles in **Johnsey Estates (1990) Ltd v Secretary of State For Environment** [2001] EWCA

Civ 535, paragraph 21, which were adopted with slight modification by Phillips JA in **Bardi Limited v McDonald Millingen** [2021] JMCA Civ 25 at paragraphs [16] to [18], as follows:

> "(i) costs cannot be recovered except under an order of the court;
>
> (ii) the question whether to make any order as to costs - and, if so, what order - is a matter entrusted to the discretion of the trial judge;
>
> (iii) the starting point for the exercise of discretion is that costs should follow the event; nevertheless,
>
> (iv) the judge may make different orders for costs in relation to discrete issues – and, in particular, should consider doing so where a party has been successful on one issue but unsuccessful on another issue and, in that event may make an order for costs against the party who has been generally successful in the litigation;
>
> (v) the judge may deprive a party of costs on an issue on which he has been successful if satisfied that the party has acted unreasonably in relation to that issue; [and]
>
> (vi) an appellate court should not interfere with the judge's exercise of discretion merely because it takes the view that it would have exercised that discretion differently."

[25] In extrapolating and applying those principles, Phillips JA stated that the first question was to decide who won the appeal. This is the point of departure from which the court may then take the route of a "quasi-scientific" assessment of the time and costs spent on particular issues or, as is often the case, make a "broad-brush judgment" (see **Sycamore Bidco Ltd v Breslin & another** [2013] EWHC 583, at paragraph 28 per Mann J). In the end, the court exercises its discretion to make "an order that reflects the overall justice of the case" (see **Travelers Casualty and Surety Co of Canada and another v Sun Life Assurance Co of Canada (UK) Ltd and another** [2006] EWHC 2885 (Comm) at paragraph 11 per Clarke J).

[26] The essential focus of the appeal, which we heard, was whether the IDT's decision should stand undisturbed, as the learned judge had decided. Her decision was upheld. That was the core and dispositive issue. All the other grounds were either related to or subordinate to that question, some of them being primarily attributable to errors made by the learned judge which did not affect the outcome of the case. This case was not similar to **Crichton Automotive Limited v Fair Trading Commission** [2017] JMCA Civ 6 ('**Crichton Auto v FTC**'), where the appellant could be said to have won on the substantive ground(s). The respondents, in this case, were the clear winners of the appeal.

[27] Nevertheless, I hold the view that had there been earlier concessions, by the respondents, the amount of time allocated to the matter might have been shortened, albeit not significantly. I say this because three of the six grounds were inextricably bound with the **Compair** case. These were questions of whether **Compair** was an irrelevant consideration (ground ii), whether the IDT made an error of law that went to jurisdiction (ground iii) and whether the award should have been quashed (ground v). So, even if the respondents had conceded earlier on the **Compair** question (ground ii), at least some of the arguments would still have been dealt with in the other related questions. This is also evident from the appellant's attribution of public benefit to the clarifications about the **Compair** case and the distinction between errors of law that went to jurisdiction and those that did not. So, **Compair** would likely have factored in the arguments before us irrespective of any early concession on it.

[28] Also, the issues which were conceded at the hearing of the appeal, for instance whether the company could take its case directly to unionised workers, did not account for such a considerable portion of the arguments (some were conceded in written submissions), and there was nothing about the conduct of the appeal that was so improper, to justify a deprivation of costs in relation to the respondents.

[29] Taking these factors into consideration, it is unnecessary to delve sequentially into each of the issues that had been argued in the appeal. That might be useful in some

cases, perhaps involving a high degree of complexity with mixed outcomes, but it is not a practicable approach, in this case, where a global look seems to be appropriate.

[30] In arriving at this position, I have kept in mind Simon Brown LJ's observation in **Budgen v Andrew Gardner Partnership** [2002] EWCA Civ 1125 at paragraph [35], that:

> "…the court can properly have regard to the fact that in almost every case even the winner is likely to fail on some issues…"

[31] As regards a flexible and global view, I have also considered the following exhortation by Miles J in **Terracorp Limited v Rajesh Mistry and others** [2020] EWHC 2623, paragraph 98:

> "…while the extra costs associated with failed points need to be considered, the court still has to stand back and look at the matter globally and consider the extent, if any, to which it is just to deprive the successful party of costs (see the guidance given in [**Sycamore Bidco v Breslin** [2013] EWHC 583 (Ch)]). The exercise is not mechanical, and it involves an element of discretionary judgment. The ultimate question is what the just costs order is." (Underlining as in the original)

[32] I now turn to the appellant's urging of the court to consider that there was a public interest element in the appeal, as regards questions of what would constitute proper consultation under the Code and whether an employer should take its case directly to employees who are represented by a tardy trade union. It cannot be gainsaid that these matters affect industrial relations practice in Jamaica. However, the appellant did not provide any compelling reason or supportive authority as to why this matter should be treated as one of such public importance to justify a departure from the general rule that costs follow the event.

[33] Observations by Morrison JA (as he then was) are instructive on this issue. In **Capital & Credit Merchant Bank Ltd v Real Estate Board and Real Estate Board v Jennifer Messado & Co** [2013] JMCA Civ 48 ('**Capital & Credit Merchant Bank**

Ltd'), a case in which this court dealt with the question of whether the appeal concerned a matter of public interest and the effect that this could have on the apportionment of costs, Morrison JA opined at paragraph [13]:

> " …I expect that it may well be true that sections – perhaps significant sections - of the public may have an interest in the court's interpretation of the Real Estate Dealers and Developers Act….But I would also expect this to be equally true of many of the various types of matters which come before the court from time to time. This appeal was essentially a contest between CCMB's commercial interest and the Board's regulatory powers. Interested as members of the public at large may be in the outcome, there is nothing in that circumstance, in my view, that necessarily makes an order that each party should bear its own costs the most appropriate order in this matter."

[34] Similarly, in **Crichton Auto v FTC**, the appellant urged this court to give directions relative to public law and scales of costs. The appellant, a car dealer, had been liable for false advertising in breach of section 37(1)(a) of the Fair Competition Act, a strict liability offence. This court held that the fact that the matter involved a public body and concerned an important issue did not make it one of public interest such that any rules of public law or public policy would be invoked (see paragraph [33] per P Williams JA).

[35] In **William Clarke v The Bank of Nova Scotia Jamaica Ltd** [2013] JMCA App 9 ('**Clarke v BNS**'), the court was concerned with the constitutionality of rule 2.4(3) of the CAR. All the parties shared the view that the rule was inconsistent with section 109 of the Constitution of Jamaica and this court found that to be so. On the matter of costs, Harris JA made the following observation at paragraph [69]:

> "The applicant has been successful in having the order of Brooks JA discharged on the preliminary point. It follows that, ordinarily, he would be entitled to his costs.
>
> The decision of the court creates a risk that the respondent could be condemned in costs. However, it is entitled to resist an order for costs being made against it. The question therefore, is whether, in the circumstances of this case an

> order for costs should be imposed on it. There can be no dispute that, despite its withdrawal, the objection raised originated with the respondent and would have given rise to the question as to the constitutionality of the impugned rules. It was the central catalyst of the event which led the court to give consideration to the validity of the rules."

And continuing at paragraph [70]:

> "However, the fact that the issue raised ended favourably for the applicant, this, in itself, does not mean that the respondent should be made liable for costs. The matter proceeded at the instance of the court. The questions as to the constitutionality and validity of the rules permitting a single judge to hear and dispose of an appeal have been a concern for the court and in its opinion, the issue, being a matter of law and of great public importance ought to have been resolved. The resolution of the matter is not merely one which inures for the benefit of the applicant but for all litigants. In the circumstances, it would be just that each party bears his own costs. Consequently, there shall be no order as to costs."

[36] From these authorities, it is evident that the deciding factor is not whether there is a general public interest in the outcome of the case as that would be true for many cases. Further, **Clarke v BNS** is distinguishable from the case before us in that it involved the constitutionality of the court's power and all the parties involved were of one accord that the impugned rule was unconstitutional. The decision was a benefit to all litigants; the appeal had proceeded at the instance of the court; and no other interest was being served but the administration of justice and, by extension, the public interest.

[37] As I indicated earlier, this case dealt with issues of some significance, but no compelling argument was advanced by counsel nor did the circumstances disclose an inescapable basis to justify allocation of costs, based on public benefit. The matter was essentially a contest between the appellant and the respondents. I, therefore, do not agree with the appellant that, on the basis of a public benefit, the outcome of the case should result in the respondents being required to bear the appellant's costs or that each party should bear its own costs.

[38] It is highly relevant that the losing party successfully argued a crucial point and won on three other grounds, including those on which the respondents conceded. The appellant conceded ground one during the hearing of the appeal, but the late concession, according to counsel, had to do with the availability of the relevant gazette evidencing the appointment of the member to the IDT. It should be recalled, though, that in the face of a reasonable ground for such concession, counsel sought, through oral submissions, to expand ground (i) and this was disallowed by the court. Notwithstanding, there was no significant loss of time in pursuit of that ground.

[39] Undoubtedly, the appellant won on issues that should not have been in dispute. At the date of the appeal, the law, as it pertained to the learned judge's power to review errors of law by the IDT, was in fact settled in this jurisdiction, as was observed in the judgment. It should also not have remained a point of contention, up to the hearing of the appeal, whether an employer could properly take its case directly to employees where they were represented by a tardy trade union. On these points, it is sufficient to say that time was spent, unnecessarily, in the preparation of and or exposition of grounds which should have been conceded before the trial. It is therefore, my view, that there is a basis for some concession in costs.

[40] I will now examine some cases which demonstrate that the general principle - costs follows the event - is not mechanical and that the courts will exercise its discretion by looking at the case globally to arrive at a just costs order.

[41] In **Darnel Fritz v John Collins** [2021] JMCA Civ 8, Brooks JA (as he then was) dealt with an appeal which was allowed in part. The point on which the appellant succeeded was "not an insignificant point" but the court was not of the view that it amounted to results which were evenly balanced. The weight of the issues, therefore, balanced out in the respondent being awarded 75% of the costs of the appeal.

[42] At paragraph [12] of the judgment, Brooks JA referred to the guidance from Morrison JA in **Capital & Credit Merchant Bank Limited** (where he examined the

applicable principles where a party had succeeded on appeal but failed on some issues), and stated:

> "In that case, after considering the degrees of success that each party had had [sic], the court ordered that costs be apportioned proportionately. Morrison JA opined that whatever interest the public may have had in the result of the case, which involved a public entity, it did not justify an order that there should be no order as to costs."

[43] The case of **Capital & Credit Merchant Bank Ltd** concerned the issue of costs in a consolidated appeal. In one of the appeals, Capital and Credit Merchant Bank Limited ('CCMB') was the appellant while the Real Estate Board ('the Board') was the respondent. The Board also filed a counter-notice of appeal, by which it challenged an aspect of the judgment. In the other appeal, the Board was the appellant and the respondent was Jennifer Messado & Co ('JM & Co'). In that appeal, JM & Co also filed a counter-notice of appeal.

[44] In the first case mentioned, the appeal and counter-notice of appeal were dismissed. In the second, the appeal was dismissed but the counter-notice of appeal was allowed, in part. The apportionment of costs was on the basis that, in the first case, both CCMB and the Board had a measure of success; while in the second, the Board had failed and JM & Co had a measure of success.

[45] After considering the submissions and authorities, Morrison JA, awarded the Board 75% of the costs in the first case, to be paid by CCMB. In the second case, JM & Co was awarded 65% of its costs, to be paid by KES Company Limited (a company in liquidation that was not a party to the appeal).

[46] At paragraph [10] of the judgment Morrison JA opined:

> "The question of whether to make any order as to costs- and if so, what order- is therefore a matter entrusted to the discretion of the court. The starting point under the rules, reflecting the longstanding position at common law, is that costs should follow the event. The court may nevertheless

> make different orders for costs in relation to discrete issues. It should in particular consider doing so where a party has been successful on one issue but unsuccessful on another issue. In that event, the court may make an order for costs against a party who has been generally successful in the litigation."

[47] In addition to those cases I have already cited, I should also refer to the case of **VRL Operations Ltd v National Water Commission and others** [2014] JMSC Civ 84, cited by the 1st respondent, in which Morrison J succinctly rehearsed the relevant principles and cases, including **Re Elgindata Ltd (No 2)** [1992] 1 WLR 1207 and **Phonographic Performance Limited v AEI Rediffusion Music Ltd** [1999] 2 ALL ER 299. **University of Technology v Industrial Disputes Tribunal and others** [2017] UKPC 22 was also cited by the 1st respondent but no context was provided and the case did not deal with principles of costs allocation. Although in some of the cases referenced, the court was considering costs allocation where a party had succeeded on appeal, in part, there is no great difference in how costs will be allocated in the instant case where the appeal failed but the appellant succeeded on some grounds. In the end, the court's discretionary power to award costs must serve the interests of justice.

[48] Given that the respondents won the appeal, they should have the costs of the appeal. But I would reduce those costs by 25%, to take account of the fact that the appellant won on some issues. They also won on issues, which, if conceded earlier, might have shortened the preparation and trial time. This outcome seems to meet the overall justice of the case.

[49] For all these reasons, I would substitute the order at paragraph [114] of the judgment, delivered on 26 March 2021, with the proposed order that the respondents be awarded 75% of the costs of the appeal, to be taxed if not agreed.

[50] Before concluding, I should make a comment on the appellant's written submissions on costs. Counsel made certain statements that tended to re-argue points that were dealt with in the appeal and to criticise the court's decision. This was improper

and irrelevant to the purpose for which counsel was allowed to make further submissions. Although I am moved to express the court's disapproval, the indiscretion will be treated as an aberration.

MCDONALD BISHOP JA

ORDER

The respondents are awarded 75% of the costs of the appeal, such costs, to be taxed if not agreed.